

Comparative Experiences of Implementing Human Rights in Closed Environments: Monitoring for Rights Protection

Anne Owers

This article articulates five components for implementing human rights in closed environments – namely (1) courts, (2) independent complaints investigation, (3) independent inspection, (4) independent citizen volunteer bodies and (5) operational management of the detention system – then focuses attention on the third and fifth elements. The article critically analyses the healthy prison standards (the four elements of which are safety, respect, purposeful activity and resettlement), which is the methodology adopted by Her Majesty's Inspectorate of Prisons for England and Wales for prison inspection, and one that has been adapted for use more widely in other closed environments (such as, immigration detention).

I INTRODUCTION

For nine years, as Chief Inspector of Prisons for England and Wales, I was statutorily responsible for inspecting a range of closed environments in the United Kingdom – prisons, immigration detention facilities, military detention and latterly police and court cells.¹ By invitation, I have also inspected prisons in Canada, Jamaica and the Sudan and visited prisons in the United States and United Kingdom military detention facilities in Afghanistan.

My inspectorate also coordinated the United Kingdom's National Preventive Mechanism (NPM) mandated under the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT), which the United Kingdom was among the first to sign.² OPCAT brought together 18 different bodies in the four nations of the United Kingdom with a right to enter and report on conditions and treatment in all forms of detention, including psychiatric institutions and secure children's homes. In 2012, it published its

-
- 1 All inspection reports produced by Her Majesty's Inspectorate of Prisons can be accessed on the Inspectorate's website <www.justice.gov.uk/about/hmi-prisons>.
 - 2 *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT), adopted 18 December 2002, UN Doc A/RES/57/199 (entered into force 22 June 2006). This Optional Protocol was ratified by the United Kingdom on 10 December 2003.

second annual report,³ focusing on issues in mental health and the use of restraints. There are many different models for NPMs, which need to match the political and legal framework: in the United Kingdom's case, this needs to reflect the increasingly quasi-federal nature of the relationship between its four nations and to include bodies which already have the right and the duty to monitor different kinds of detention facility. There are still some gaps. For example, court cells are not routinely covered and there is still a debate about the extent to which facilities holding severely disabled or very elderly people are in practice places of detention.⁴

It seems to me that there are five essential components for implementing human rights in closed environments, which should complement and reinforce each other. They all exist in different forms and with different emphases in different countries. I will of course be referring to the United Kingdom model, but that should not be taken to mean that I believe this is a template that all other countries should follow. The way these elements are provided for will differ, depending on a country's legal, political and societal characteristics.

The first and highest level is enforcement through the courts. In some countries, such as the United States, that has been a major driver of human rights compliance,⁵ and in the United Kingdom has certainly achieved some high level changes.⁶ However, there are limits to what litigation can achieve. There are problems about access to lawyers, especially for those detained only for short periods; the threshold for winning a case may be a high one; some strong individual cases are conceded so that the general point is not litigated; and in some cases, legal action results in 'you win, you lose': in other words, you win the case and then the law is changed. In the United States, for example, the ability of the Supreme Court to interfere in prison matters has been severely circumscribed.⁷

The second line of defence is independent complaints and investigations functions. These are carried out in the United Kingdom by the Prison and Probation Ombudsman,⁸ who deals with complaints and carries out investigations into deaths in prisons and immigration detention, and the Independent Police Complaints Commission,⁹ which has a similar role

3 Her Majesty's Inspectorate of Prisons, *Monitoring Places of Detention: Second Annual Report of the United Kingdom's National Preventive Mechanism 1 April 2010-31 March 2011* (February 2012).

4 Ibid, 14-15.

5 See, for example, Malcolm Feeley and Van Swearingen, 'The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications' (2004) 24 *Pace Law Review* 433; Vincent Nathan, 'Have the Courts Made a Difference in the Quality of Prison Conditions? What Have We Accomplished to Date?' (2004) 24 *Pace Law Review* 419.

6 See, for example, *Faizovas, R (on the application of) v Secretary of State for Justice* [2009] EWCA Civ 373 (13 May 2009); *AB, R (on the application of) v Secretary of State for Justice* [2009] EWHC 2220 (4 September 2009).

7 *Prison Litigation Reform Act 1996*, a federal Act that restricts prisoners' ability to litigate in federal courts.

8 Prison and Probation Ombudsman <www.ppo.gov.uk>.

9 Independent Police Complaints Commission <www.ipcc.gov.uk>.

for police custody. That is also a critical function, and one that we will be focusing on later: but it is essentially a reactive one, coming into play only when or if something has gone wrong, or might have done so.

The third element is independent inspection and monitoring. This is a process that is mandated in international law, and which appears, in a variety of forms, in most countries. The United Kingdom scheme involves a statutory inspectorate (or rather two, for there is a separate inspectorate for Scotland) headed by a Chief Inspector. The Prisons Inspectorate that I headed has mandatory right of entry, at any time and without prior notice, to all prisons and immigration removal centres, whether publicly or privately run.¹⁰ Those rights were extended, by invitation, to military detention facilities in the United Kingdom, and we were also invited to prepare the ground for inspecting such facilities overseas, in Afghanistan. With colleagues from the police and court inspectorates, we inspected police and court custody, on the same basis. Inspection is, though, an occasional event, however detailed and robust. In many jurisdictions, including the United Kingdom, it is complemented by a fourth element, independent citizen volunteer bodies, which have the right of access to places of custody on a regular basis.¹¹ Though they lack some of the powers and expertise of inspectors, at their best they provide an essential link with the community and a continuity of monitoring.

The fifth element, which is vitally important, is the operational management of the detention system itself. Institutions have to have the will, and equally importantly the capability, to change. All the sanctions and recommendations in the world, and the learning that should come out of investigations, will be ineffective if institutions lack the will, and equally importantly, the capability, to change.

II INSPECTION AND WORKING WITH MANAGEMENT

This article focuses specifically on the third and fifth elements: inspection and its interaction with those running detention systems. It is first of all necessary to define what that means – and, in relation to places where people live and are held, it must mean physically being there. You cannot inspect custodial environments by looking at papers, policies and targets met. In the words of a previous Chief Inspector of social care you need to ‘be there and smell the urine’. The notion of ‘light touch’ inspection of places of custody, driven mainly by self-assessment, can be positively dangerous in environments that operate outside public view. And, crucially, inspection must involve talking to and taking the views of those who are in detention.

In the inspectorate that I led, inspectors have access to all prisoners and detainees, all documentation, and all parts of the establishment. In prisons, for example, we had our own keys and entered wings and

¹⁰ *Prison Act 1952* (UK) s 5A.

¹¹ Independent Monitoring Boards <www.justice.gov.uk/about/imb>. For commentary see Vivien Stern, ‘The Role of Citizens and Non-Profit Advocacy Organizations in Providing Oversight’ (2010) 30 *Pace Law Review* 1529.

cells without being accompanied by staff. We would inspect everything that happened there. For example, taking with us specialist health care and education inspectors, who inspected those areas against the same standards they would use to inspect health, education and training in the community. In all full inspections, we would carry out a confidential survey of a randomly selected number of prisoners, seeking their views about the detention experience.

All reports, with recommendations, are published,¹² and the timing and content is a matter for the Chief Inspector alone. Publication is important, for transparency, accountability and also to stimulate action. We would amend any factual inaccuracies, but the judgments and analysis are ours, and in nine years I was never stopped from publishing anything. The Inspectorate also carries out thematic inspections; for example, into health care, diversity issues such as race, religion or disability, and suicide prevention. Thematic reviews can take significant time to achieve results, but have been instrumental in, for example, the takeover of health services in prisons by the National Health Service as a whole, with considerable improvements in the quality of care.¹³

We developed our own independent methodology and criteria for inspection, based around the notion of a 'healthy prison' or 'healthy custodial environment'. It may sound like a contradiction in terms, but derives from a World Health Organization report into suicides in prison, defining an environment which works as a whole to protect and not damage those within it.¹⁴

The Healthy Prisons model rests on four pillars, which are fundamental to the human rights of prisoners and detainees. These pillars are:

1. that prisoners or detainees, even the most vulnerable, are *safe*;
2. that they are treated with *respect* for their human dignity, whatever they have done;
3. that they are able to engage in *purposeful activity* – and I stress 'purposeful'; and
4. that they are prepared for *resettlement* back into the community, wherever that may be.

Suitably adapted, these four tests can operate successfully in any closed environment.¹⁵

12 Inspection reports are available online at Her Majesty's Inspectorate of Prisons <www.justice.gov.uk/publications/inspectorate-reports/hmi-prisons>.

13 See Her Majesty's Inspector of Prisons, *Patient or Prisoner? A New Strategy for Health Care in Prisons*, London (1996).

14 World Health Organization, *Health in Prisons. A WHO Guide to the Essentials in Prison Health*, World Health Organization (2007).

15 See, for example, Her Majesty's Inspectorate of Prisons, *Expectations: Criteria for Assessing the Conditions for and Treatment of Immigration Detainees* (Version 3, 2012) <www.justice.gov.uk/downloads/about/hmipris/immigration-expectations.pdf>; Her Majesty's Inspectorate of Prisons and Her Majesty's Inspectorate of Constabulary, *Expectations for Police Custody: Criteria for Assessing the Treatment and Conditions for Detainees in Police Custody* (Version 2, 2012) <www.hmic.gov.uk/publication/expectations-police-custody-criteria>.

In assessing the health of prisons and other places of detention under those four tests, the Inspectorate developed detailed criteria, called *Expectations*, and set out the evidence that should underpin those criteria. There are separate criteria for adult and juvenile prisons, for immigration, police custody and military detention. They are referenced against international human rights standards and are published, and can be accessed, on the Inspectorate's website.¹⁶ They are not the same as the standards that those institutions may set themselves, or the targets they may be set by government, for a number of reasons. Standards and targets usually set the bottom line, not the best practice; they are likely to focus on process and output, rather than qualitative outcomes, and on cost rather than value (often measuring what is measurable rather than what is important); and in some settings or countries they may deviate from what is right. All institutions have a tendency to become self-referential and to have a default setting of institutional convenience. This is even more true for closed environments, hidden from public gaze, which tend to hold people who are marginalised or unpopular.

That is not to say that those internal standards, and their implementation, are not important. It would be nonsensical to assume that occasional inspection, even without warning and in detail, could ensure that prisons and places of detention were, and remained, responsive to human rights concerns. So, processes of internal audit, confidential complaints and their resolution, staff training and management are all important. Those processes themselves have been informed by inspection: for example, Prison Service audits now include confidential sessions with prisoners feeding back their views on the quality of prison life (borrowing from the Inspectorate's confidential surveys, which were at first hugely resisted by every inspected body).

III THE INTERACTION OF INSPECTION AND MANAGEMENT

Inspection would simply be penal voyeurism if its recommendations and insights were not then acted on by those running those institutions. In practice, around two-thirds of recommendations in relation to prisons and immigration detention centres were implemented by the time we returned to check in around two years (always without warning). I have great admiration for the good staff and managers who every day have to confront some of the most challenging and damaged people in our society. I hope that inspection encourages and allows them to ask 'why?' as well as 'how?' and to push back against negative cultures or institutional lethargy. It also, importantly, provides public affirmation for the good things that go on in prison and the dedicated staff who do them.

I have rarely, if ever, been on an inspection where we did not find out something that the prison governor or centre director did not know

16 See Her Majesty's Inspectorate of Prisons, *Expectations: Inspection Criteria* <www.justice.gov.uk/about/hmi-prisons/inspection-and-appraisal-criteria>.

was happening; or something that they thought was happening, but was not. In good prisons or detention facilities, those were often small things, easily remedied. In bad establishments, they were much bigger and more troubling. Early on, I developed the theory of the 'virtual prison' – the one that runs in the governor's office, is communicated to the area manager, and finds its way on to the minister's desk. Inspection by contrast reveals the actual prison that is running on the landings and in the cells. It cuts through that charcoal filter that in all institutions tries to remove all impurities as messages pass up the line to managers and politicians, who rarely investigate further if institutions are apparently meeting their targets.

Generally, in prisons, I found that those responsible for the system as a whole were on the same page, provided that the findings were based on evidence. The Inspectorate's focus on safety, respect and valuable activity largely chimed with their own objectives and aims. Inspection messages might not be comfortable, but for good managers they provided a necessary early warning system, or red light; or a welcome confirmation. That was, however, much less the case for those responsible for immigration detention. Whereas for prisons, looking after prisoners is the job, and a job that good managers want to do well, in immigration it is instrumental to the main purpose, which is removing or deporting people. And once custody becomes instrumental, conditions and treatment can become a lesser goal. So, for example, it was very hard to convince those responsible for immigration removal centres that the detention of children and babies with their parents for indefinite periods was quite simply wrong; or indeed that inspection findings which contradicted stated policy were accurate. There was a tendency amongst officials and centre managers to assume that if it was policy, by definition it was happening, if it was not policy, by definition it did not need to. To some extent, we overcame that initial resistance, which was always stronger at senior and bureaucratic level than among those actually working with detainees, but it was always there.

The same was true, though to a lesser extent, in police custody, where detention is often part of the investigatory process. While police are now very alert to the need to prevent or minimise deaths in custody, there was often no strategic oversight of custody, or specific training and support for the custodial role. That meant that other areas – such as, the condition of cells, access to health care (particularly mental health care), and proper support for juveniles – were much less prominent concerns. I believe that the fact of inspection has raised the profile, and the priority, of safe and decent custody.

Probably the most difficult environment in which to try to stress the paramountcy of concerns about safety and respect is military detention overseas, where people are being held because they are thought to be sources of intelligence or involved in insurgency. There the priority is to obtain information, which often involves isolating and disorientating detainees, rather than caring for and supporting them. Equally, at the

point of detention itself, the detaining unit is likely to have just been in conflict with the detainee, who may have been responsible for death or injury to comrades. One of the strong recommendations, therefore, from inspectors and judicial inquiries, has been to strengthen and ensure the independence of the army's specialist custodial arm, the military provost staff (MPS) to push back where necessary against the operational arm. By contrast, we found that military detention facilities in the United Kingdom, run by the MPS, were in general more positive than prisons.¹⁷ This was because those being detained were seen as 'our boys – and girls' who belonged to the armed services, could end up serving alongside those who were detaining them, and needed retraining. There was therefore a shared sense of belonging.

IV EVALUATION

We need to consider, then, how all this activity helps to promote human rights in these environments, and why there is such an emphasis in international and domestic law on external independent inspection. As I have already said, closed environments can be places that invent their own reality and norms. What is more, they are always places where power rests with the custodian, not the prisoner or detained person. As one of our eminent human rights lawyers said, adapting a famous quotation from Lord Acton, '[a]ll power is delightful, and absolute power is absolutely delightful'.¹⁸ Closed environments can therefore go bad very quickly.

Thankfully, sustained and systematic abuse is rare in our prison system, but it has happened. In one of England's largest prisons, less than 20 years ago, it was discovered that, in the words of one later report, there had been 'a prolonged period of staff brutality ... often this approximated to torture'.¹⁹ This could not have happened without the collusion, or weakness, of managers. More recently, I had to act as an expert witness into the inquiry into the death of a hotel receptionist, Baha Mousa, at the hands of British troops detaining him in Iraq. He had not been involved in any aggression against British forces. The inquiry report found that he spent most of 36 hours hooded with a hessian sandbag over his head, forced to adopt stress positions – though both of these techniques had been specifically banned as aids to interrogation by United Kingdom forces more than 30 years earlier. According to the report 'he was subjected to violent and cowardly abuse and assaults by British servicemen whose job it was to guard him and treat him humanely ... A subsequent post

17 See, for example, Her Majesty's Inspectorate of Prisons reports on the Military Corrective Training Centre <www.justice.gov.uk/publications/inspectorate-reports/hmi-prisons/other-jurisdictions/military-corrective-training-centre-colchester>.

18 Sir Sydney Kentridge QC, 'Taking Liberties' (Paper presented at the Bar Conference, London, 3 November 2007).

19 See Vikram Dodd, 'Prison Whistleblower lifts lid on "regime" of torture', *The Guardian* (UK), 13 November 2006.

mortem examination of his body found that he had sustained 93 external injuries'.²⁰ Once again, senior officers either colluded or turned a blind eye. It was as a result of his death that the military authorities asked the Prisons Inspectorate to extend its work on military detention in the United Kingdom to include detention in theatres of war overseas.

Those are extremes, and thankfully rare in our system and led to inquiries and significant changes. But they point to an important fact: that abuse can happen once a closed environment, and its management, loses its moral purpose. It is therefore very important to recognise that inspection exists to prevent, not to chronicle, abuse. It needs to work upstream of torture or inhuman and degrading treatment. And it does so by insisting on the need for safe, decent and rehabilitative work in places of custody. For if those working in and running these establishments lose the sense that they are caring for human beings, and that those human beings under their care can change and develop, they are on a downward slope.

An example of this, in my last few months as Chief Inspector, was a ploy developed by staff in two London prisons to try to burnish their inspection reports. They decided that it would be a good idea to swap a few of their more challenging prisoners for the duration of their announced inspections. But challenging prisoners are also sometimes the most vulnerable, and it is known that it is in the early days of being in a prison that prisoners are most vulnerable. Two of those moved made suicide attempts when they were told, with no notice, that they were to be moved. One cut himself and had to be taken by force, wearing only boxer shorts, and with a bloodied face, to a waiting van. On arrival at the second prison he attempted to hang himself. That sequence of events is close to inhuman and degrading treatment, although that was undoubtedly not the intention of those who dreamed up this plan. Yet, by ceasing to treat those prisoners as human beings, and thinking of them only as pawns on a chessboard that could be moved about to advantage, whose wellbeing was negotiable, they had set in train the events that led to that.²¹ In the language of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR),²² by failing to respect art 8 (the right to private life and dignity), they had moved to, or close to, breaching art 3 (the prohibition against torture or inhuman and degrading treatment).

It is for that reason that protecting human rights in closed environments has to start at the level of the everyday, not the extreme. Colin Allen was my first Deputy Chief Inspector and was instrumental in setting the ethical and human rights-based culture that I inherited. When he left,

20 Rt Hon Sir William Gage, *The Report on the Baha Mousa Inquiry*, Volume III, 8 September 2011, [1].

21 Her Majesty's Chief Inspector of Prisons, *Report on an Announced Inspection of HMP Pentonville 11-15 May 2009* (2009); Her Majesty's Chief Inspector of Prisons, *Report on an Announced Inspection of HMP Wandsworth 1-5 June 2009* (2009).

22 Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*.

he posted only one message for his successor, which sat on his notice board until the day he too left. It simply said ‘underpants’: don’t forget the importance of apparently mundane things in an environment where everything – what and if you eat, whether and if you get out of your cell, what you wear and do – is controlled by someone else.

V TRANSLATING HUMAN RIGHTS: THE HEALTHY PRISON TEST

Let me go through some of the things that we found and reported on under the four ‘healthy prison’ tests I referred to earlier – mainly in prisons, but also in other custodial settings.

A Safety

Safety has two aspects: prisoners need to be safe from others, but also from themselves. Prisons are not inherently safe environments – they contain some damaged and damaging individuals. They only remain safe because people spend a lot of time making them so, and this is never a certainty. Security and safety depend not just on locks, bolts and bars: and if they come to depend on physical force, like some I have seen in other countries, they have lost it. They depend mostly on what is called ‘dynamic security’, that rests on relationships and the intelligence and knowledge that comes from that.²³

When the state takes someone into custody, it acquires a positive duty to preserve their life. That does not simply mean not killing them; it means taking positive and reasonable steps to prevent their death. When I first became Chief Inspector, the suicide rate in prisons was running at nearly two a week. In one women’s prison I inspected, we found women coming in with untreated drug addictions who were fitting and vomiting in their cells as they withdrew and we said that effective detoxification and support services needed urgently to be put in place. They were introduced, 18 months later, but in the interim six young women had killed themselves, all in the first few weeks of imprisonment and all coming off hard drugs. Such events led to court cases which established that independent investigation of deaths in custody was mandated under human rights law.²⁴ The Prisons and Probation Ombudsman now investigates all deaths

²³ Leggett and Hirons explain that ‘dynamic security is essentially a way of working that relies on the traditional strengths of prison staff: developing relationships with prisoners, keeping them occupied, establishing trust and effective communication and therefore “knowing what is going on” – Kevin Leggett and Brian Hirons, ‘Security and Dynamic Security in a Therapeutic Community Prison’ in Michael Parker (ed), *Dynamic Security: The Democratic Therapeutic Community in Prison* (Jessica Kingsley Publishers, 2007) 234.

²⁴ See, for example, *R (on the application of Amin) v Secretary of State for the Home Department* [2003] UKHL 51.

in prisons and immigration detention, and coroners now provide narrative verdicts setting out the circumstances as well as the causes of death.²⁵

Support mechanisms in those early days of custody have greatly improved, and it is now accepted, in the words of an inspectorate report, that 'suicide is everyone's concern'.²⁶ In other words, it is not primarily a medical issue, but its prevention requires care and support from the whole establishment. Care and treatment plans need to be drawn up and all staff are responsible for implementing them. Suicides went down considerably – in fact the rate halved over eight years – though there are some disturbing indications, as resources shrink and the number of prisoners continues to increase, that they are beginning to rise again. And they are still highly concentrated among new prisoners: last year, half of all prisoners who committed suicide were unsentenced²⁷ and a third had been in their current prison for less than seven days.²⁸ The combination of preventive independent inspection and reactive independent investigation, in both prisons and police custody has, I believe, been a key factor in the overall reduction in the suicide rate.

However, self-harm in prisons, particularly among women, remains prevalent and often extreme. Women make up only 5 per cent of the population, but are responsible for nearly half the incidents of self-harm.²⁹ At our largest women's prison, Holloway, in the worst month of the year, they were dealing with over 10 serious incidents a day. Many of those are gruesome and repeated self-mutilations by women who are seriously mentally ill, or have suffered past abuse, or both.

Prisoners and detainees can also be at risk from other inmates. In most of our male prisons, men will find themselves locked up for significant parts of the day with a stranger, who may be psychotic, violent or experiencing withdrawal from drugs, or all three. Preventing and reducing violence is important in itself, as well as often being the key to changing the kind of behaviour and anger that led to prison in the first place. In my experience, prisons are much less good at this, tending to over-rely on disciplinary punishments, rather than dealing with the underlying causes. There are, however, some interesting developments in restorative justice within prisons, not just in relation to prisoners and the victims of

25 Prisons and Probation Ombudsman <www.ppo.gov.uk/investigating-fatal-accidents.html>.

26 Her Majesty's Inspectorate of Prisons for England and Wales, *Suicide is Everyone's Concern. A Thematic Review by HM Chief Inspector of Prisons for England and Wales* (May 1999).

27 HM Chief Inspector of Prisons for England and Wales, *Annual Report 2008-09* (2010) 6.

28 Jenny Shaw, Denise Baker, Isabelle Hunt, Anne Moloney and Louis Appleby, 'Suicide by Prisoners. National Clinical Survey' (2004) 184(3) *British Journal of Psychiatry* 263.

29 See Jo Borrill, Louisa Snow, Diana Medlicott, Rebecca Teers and Jo Paton, 'Learning from "Near Misses": Interviews with Women who Survived an Incident of Severe Self-Harm in Prison' (2005) 44(1) *Howard Journal of Criminal Justice* 57, 57.

their crimes, but also in relation to prisoner on prisoner violence.³⁰ This is something that inspections try to encourage.

I have already mentioned incidents of abuse from staff and the power they wield. It is clearly necessary from time to time to use disciplinary measures to keep prisons, prisoners and staff safe. This can include disciplinary hearings and sanctions, such as segregation or loss of privileges, as well as the use of force. But it is essential that these measures are exceptional and carefully documented and monitored to ensure that their use is both necessary and proportionate. People working in prisons – and even those inspecting them – can become inured to practices that are not humane or fair. I well remember the first adjudication I witnessed, where a woman diagnosed with paranoid schizophrenia, and whose medication had been changed, was being disciplined for failing to leave the yard. As an inspectorate, we had particular concern about the forcible strip-searching of juveniles, many of whom had been subject to abuse in their past. I will not easily forget a video of a 16 year old being held down by four men while he screamed ‘don’t take off my boxers! Please don’t take off my boxers’. We also stressed the importance of monitoring. We found, in most police forces, that incidents where force had been used were recorded only on each individual’s custody record. There was no central record that could be examined regularly to see whether particular officers, or particular detainees or racial groups, were too often involved in such incidents.

Immigration removal centres raise other human rights issues. Immigration detention is the only area of law where people can be detained, without limit of time, purely through administrative decision, without needing to come before a court for judicial determination. This squeezes past the normal protections provided for due process and oversight of incarceration. It also shows, in my experience, why those protections are needed. The requirement to prove necessity and justification before a court makes for better decision making; conversely, the ability to lock up at random anyone in breach of immigration law makes for lazy and sometimes casual decisions. At one immigration removal centre, we found a British citizen, who, in spite of producing documents proving his nationality, had been detained for nine months. The detention of families with children and babies caused us great concern, especially as we found that in the majority of cases they were then released, rather than immediately removed. The proportionality of detaining children – some approaching public examinations, some suffering from learning disabilities, and many whose wellbeing was visibly deteriorating in detention – was never properly balanced against the necessity of detaining a family.³¹

30 See, for example, Tim Newell, ‘Face to Face with Violence and its Effects: Restorative Justice Practice at Work’ (2007) 54(3) *Probation Journal* 227.

31 HM Chief Inspector of Prisons, *Report on an Announced Inspection of Yarl’s Wood Immigration Removal Centre 4-8 February 2008* (2008) 31-32.

B *Respect*

Under the heading of respect, the inspectorate would look at such issues as the environment, relationships between staff and prisoner, diversity, and complaints and incentives schemes. Prisons and police cells are sometimes old, tired and poorly maintained. I have been in prisons where soil stacks leak down the walls, windows are missing, and heating is not working. Prison staff do not want to hold people in those conditions, and sometimes welcome inspection as a way of shaming the service into taking action: inspection succeeded in closing down a whole wing at one prison. One of my predecessors succeeded in virtually stopping the practice of ‘slopping out’ – prisoners processing to the toilets each morning with the contents of the buckets they had had to use overnight.³² It has still not entirely stopped, but the alternative – placing a toilet directly next to a double bunk, in a small cell in which two men eat, sleep and sit (sometimes on the toilet seat) – means that prisoners are effectively living in a lavatory. I do not know of any other public building where eating and defecating in the same space would be permitted. In some extreme cases, this has been held to be in breach of human rights, but in general its sheer prevalence means that the courts are reluctant to outlaw it.³³ However, if inspection stops saying that it is wrong, what has become normal will become normative.

I have already referred to underpants. I’ve been in prisons where they are only changed once a week, and where showers can be as rare as that. I was in one prison where a prisoner in a wheelchair had waited over nine months for a shower, because the staff refused to push the wheelchair on occupational health and safety grounds. Those things diminish the individuals involved, clearly signalling that they are not worth much. The amount and variety of food is also a constant refrain in most prisons, especially among young men. Much of this would not reach the threshold of a human rights violation, but it can be the beginning of a slippery slope that does. There are lighter moments as prisons try to get their house in order before an announced inspection: the smell of wet paint that often greets inspectors, or the imam in a private prison who, when asked if he knew what we did, replied ‘Yes, you are the people who make potted plants appear’.

Relationships between staff and prisoners are crucial. A leading United Kingdom prison criminologist, Alison Liebling, of Cambridge University, has done a lot of work on what she calls the ‘moral performance’ of prisons – the way in which the prevailing culture affects prisoners and staff.³⁴ I have been in prisons where prisoners were referred to as ‘cons’, ‘bodies’ or even ‘vermin’. There is a clear link between safety and proper

32 Independent Monitoring Boards, *‘Slopping Out?’ A Report on the Lack of In-cell Sanitation in Her Majesty’s Prisons in England and Wales*, National Council for Independent Monitoring Boards (August 2010).

33 See, for example, *Grant v Ministry of Justice* [2011] EWHC 3379 (QB) (19 December 2011).

34 Alison Liebling and Helen Arnold, *Prisons and Their Moral Performance: A Study of Values, Quality and Prison Life* (Oxford University Press, 2004).

relationships, and the culture of a prison. A report from the parliamentary human rights committee on deaths in custody noted:

Prevention of deaths in custody can best be achieved in a system which ... sustains a culture which respects the dignity, privacy and autonomy of the people it detains and their rights ... [T]he positive obligation to protect people detained by the State is not only a matter of physical security, but of the culture of detaining institutions ... the extent to which people are treated with dignity, the quality of relationships between prisoners and staff, are all critically important.³⁵

It can, though, be difficult to balance the two principles of safety and respect. I have been in prisons where seriously self-harming men and women were placed in bare and austere cells, in skimpy tear-proof clothing, to try to prevent them killing themselves. In some jurisdictions, there is widespread use of straitjackets or the equivalent. This does nothing to deal with the underlying causes of self-harm, and indeed can exacerbate them.

Another critical issue is the way prisons deal with diversity: the over-representation of people of colour in our prisons, and the problems that often arise in understanding and respecting cultural and religious diversity.³⁶ These issues become acute in our system when young Muslim men are associated – often without any cause – with terrorism and radicalisation, so that staff consciously or unconsciously treat them with suspicion and often distance.

Similarly, prisons are built and run around the needs of able-bodied young men; the treatment of an increasingly ageing and often disabled population, as well as the need for differential treatment of women, has been a focus of many inspectorate prison and thematic reports.³⁷ The link between disability and rights was well made for me when I met a young man with severe learning difficulties and asked how he got to know what the rules of the prison were – ‘If I get sent down the block, I know I’ve broken a rule’ was the response. The electric fence approach to behaviour modification, which is probably one of the reasons why he was there, is hardly human rights compliant.

One of the mechanisms for protecting human rights in closed environments is that detainees and prisoners should be able to lodge complaints, in confidence, and be sure that they are taken seriously and dealt with. That process can also be counter-intuitive. When we first inspected the

35 Joint Committee on Human Rights, *3rd Report of Session 2004-05, Deaths in Custody: Oral and Written Evidence*, House of Lords Paper 15-ii, (Session 2004-05) 105.

36 For further information see Coretta Phillips, *The Multicultural Prison: Ethnicity, Masculinity and Social Relations Among Prisoners* (Oxford University Press, 2012).

37 Her Majesty’s Inspectorate of Prisons, *Parallel Worlds: A Thematic Review of Race Relations in Prisons* (2005); Her Majesty’s Inspectorate of Prisons, *Disabled Prisoners: A Short Thematic Review on the Care and Support of Prisoners with a Disability* (March 2009); HM Chief Inspector of Prisons, *Muslim Prisoners’ Experiences. A Thematic Review* (June 2010).

military corrective and training centre in the United Kingdom, there had been two recent suicides. We asked about confidential complaints and were told they had such a system. It consisted of marching all the detainees on to the parade ground, in front of a sergeant major, who said: 'Anyone with a complaint, step forward'. It was said to be confidential, because no one knew what it was; it was said to be necessary because to have any other method would disturb the 'chain of command' on which military discipline rests. There is now a proper confidential complaints system.

C *Purposeful Activity*

I have argued that a human rights approach can provide protections against the abuse of power in prisons and other closed environments. But I also want to take a broader view. A human rights approach is not simply about preventing abuse. In prisons, at least, it defines the purpose of imprisonment. All the relevant international instruments make clear that prisons must be rehabilitative.³⁸ That is key to their good running. Prisons should not, and must not, see themselves just as places of containment. There is no such thing as 'humane containment': containment is of objects, units and goods, not for human beings. Containment is carried out by guards who engage with security and keys, not officers whose task is to engage with people. Simple containment produces individuals who emerge more frustrated, less socialised and potentially more harmful – and I have seen some evidence of that in maximum security prisons in the United States.³⁹ I need to say that one of the noticeable and gratifying elements of the United Kingdom prison system is the small number of people who are held in segregation and the protections and reviews that exist to govern that form of extreme custody. Even in our maximum security prisons, holding attempted suicide bombers and multiple murderers, very few prisoners are isolated, and then usually for only short periods. We did create a special system – the closed supervision centre system – for the most dangerous and violent prisoners, but that holds less than 40 of the over 87,000 people in our prisons.⁴⁰

International instruments are clear about the need for imprisonment to have a positive purpose. The United Nations Standard Minimum Rules for the Treatment of Prisoners provide:

The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to

38 See, for example, art 10 of the United Nations International Covenant on Civil and Political Rights.

39 See Craig Hanley, 'Mental Health Issues in Long-Term Solitary and "Supermax" Confinement' (2003) 49(1) *Crime and Delinquency* 124.

40 Her Majesty's Inspectorate of Prisons, *Extreme Custody: A Thematic Inspection of Close Supervision Centres and High Security Segregation* (June 2006).

ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life.⁴¹

Recent criminological research also stresses the importance of prisons being a place where people can be encouraged and supported to change. One of the sentences in the vision statement of my Inspectorate, which we developed together, was that ‘we believe that people and institutions can change’.

This approach has implications for staff just as much as for prisoners. The focus on ethics, values and desistance does not mean a vague ‘niceness’ approach. On the contrary, it means setting and enforcing proper boundaries, encouraging and rewarding responsibility and pro-social behaviour, and working with prisoners to challenge and change their assumptions about themselves and others. That can only occur within the context of right and professional relationships. The United Nations Standards and the European Prison Rules stress the importance of a properly-trained staff group, operating to a set of clear ethical and moral values.⁴² But staff training is not something that is properly valued in the prison systems I have looked at. In the United Kingdom, staff have six weeks’ basic training and the only subsequent mandatory training is in the use of control and restraint, and yet we expect them to look after some of the most difficult and damaged people in society – and incidentally to motivate them to engage in skills training and development.

The most recent criminological research has focused on what is called desistance, that is, the reasons and routes by which people stop offending. Desistance theory is critical of approaches that work on people, rather than with them, and that see prisoners as collections of criminogenic factors rather than people who have developed within, and will return to, a social and economic context.⁴³ Stopping long-term offending has been described as changing the narrative of one’s life: it is a journey rather than a process and one where the agency needs to rest with the individual offender. Too often criminal justice focuses solely on risks and needs – and therefore defines people as risky or needy – rather than looking for potential strengths. I would argue that a strengths-based model is essentially a human rights approach,⁴⁴ focused around the individual, and

41 United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, ESC Res 663C, UN Doc E / 3048 (1957) r 58.

42 See rr 46-54 of the *Standard Minimum Rules for the Treatment of Prisoners* and Part V of the Council of Europe, *European Prison Rules* (Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers’ Deputies).

43 For more information about desistance theory see Stephen Farrall and Adam Calverley, *Understanding Desistance from Crime. Theoretical Directions in Resettlement and Rehabilitation* (Open University Press, 2006).

44 See, for example, the Good Lives Model of Offender Rehabilitation developed by Ward and Stewart in 2003 as an alternative to the Risk-Need-Responsivity model. For more information about this human rights-based approach see Tony Ward, ‘Human Rights and Dignity in Offender Rehabilitation’ (2011) 11 *Journal of Forensic Psychology Practice* 103.

on developing agency and responsibility – things that closed environments tend to devalue or prevent.

Some of that development is achieved by providing opportunities and challenges in prisons. Many prisoners have significant educational deficits; others have little or no experience of consistent employment. Prison provides a space within which some of those deficits can begin to be tackled, and prisoners can be supported and challenged to engage in professionally delivered and relevant courses that will improve their life chances. That is also specifically provided for in the European Prison Rules, issued in 2006 by the Council of Europe, the treaty body for the ECHR.⁴⁵

Prisons, therefore, need to provide sufficient good quality purposeful activity. That will include formal and professionally delivered training in essential skills, but it will also include opportunities to take part in and develop softer skills – arts, sports and other teamwork, parenting, peer support and life skills – which can change prisoners' views about themselves and their capabilities as well as providing the motivation to engage in or to make best use of more formal skills and qualifications. There is a need, particularly for more serious offenders, as part of a package of interventions, for programs that focus on the causes of offending behaviour and seek to change ways of thinking and acting and reduce risk.

Activity is also important as an end in itself in all closed environments, whether prisons or other forms of detention: it makes those environments and those in them safer. Self-harm is often a function of depression, which is greatly exacerbated if a prisoner is locked up for long periods; assaults in prisons have usually been at their highest on Monday mornings, after long lock-up at weekends.

Many prisoners have long-standing health and substance misuse problems, which contribute to their offending and exclusion. The high incidence of mental health problems among prisoners is well-recorded, as is dependence on both illegal and legal drugs (such as alcohol or prescription medication).⁴⁶ In the United Kingdom, the closure of our large mental hospitals was supposed to be replaced by 'care in the community'. Sadly, that did not materialise and therefore a great deal of that care is in fact provided in custody. Prisons are not, and cannot be, therapeutic environments, and therefore cannot compulsorily treat those with florid and acute mental health problems. As a consequence, prisoners can deteriorate rapidly. I have seen a young man in a body belt because otherwise he would tear his clothes repeatedly in order to try to strangle himself; if given a television set, he would break the glass and eat it. I have seen a woman who repeatedly pushed batteries up herself, and had to have them surgically removed in case the lead leaked. If we think prisons are the

45 See rr 28.1-28.7 of the Council of Europe, *European Prison Rules* (Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies).

46 See, for example, Seena Fazel, Parveen Bains and Helen Doll, 'Substance Abuse and Dependence in Prisoners: A Systemic Review' (2006) 101(2) *Addiction* 181.

right answer for those people we are simply not asking the right questions. They need to be held – literally and metaphorically – in a secure environment. Prison is, however, cheap: it costs only about a quarter of the amount per prisoner per year than it would cost at a properly-staffed medium secure psychiatric unit.⁴⁷

Even with the additional mental health support now provided in prisons in England and Wales, three-quarters of mental health teams told us that they knew they could not meet the scope or scale of need. Prison should not be the first or only way that people are able to access the services they need. But it is essential that it can provide an opportunity to engage with these needs, and that this is carried out as part of health and social care provision for the whole community, both to ensure that it is done professionally and that it provides a route map to support and treatment afterwards.

D *Resettlement*

Just as prisoners need purposeful and rehabilitative activities, those who leave prison will have practical needs that require support and planning: hence the focus on ‘resettlement pathways’ into homes, jobs, further education and training, health care and family support. Too often, the sudden transition from a closed environment to the realities of the outside world is poorly managed, and such support as there has been falls away when prisoners’ hopes and expectations collide with reality. Though it is different, it is important to plan carefully for the transition from immigration detention to whatever comes next. Too often, people who had lived in the United Kingdom for decades were suddenly woken up and removed, sometimes by force, to a waiting plane.

This involves close cooperation between the inside world of prisons and the outside world to which prisoners will return. It has to engage both statutory organisations and voluntary agencies that can provide the services, support and advice that those leaving prison will need. I cannot, within the confines of a single chapter, describe how it can and should work. But I am clear that it cannot rest with prisons alone – and that leads me to my conclusion.

VI CONCLUSION

A common response to this approach to running prisons is ‘What about the victims? Why should we worry about a moral and ethical basis for treating people who have behaved immorally or unethically?’ Those are legitimate questions, and they raise wider questions of rights and responsibilities. Victims have a real interest in seeking to ensure that there are not more or repeat victims. The rights of victims, and potential victims, are best served by prisons that can contribute to desistance from crime. A prison

47 John Gunn, ‘Future Directions for Treatment in Forensic Psychiatry’ (2000) 176 *British Journal of Psychiatry* 332, 335.

that offers no possibility or expectation of change and no opportunities to develop, which demonstrates that power over others can be used arbitrarily, or allows no space or demand for individual responsibility, will simply reinforce a criminal identity and make individuals and communities less safe. It is also clear that systems that support reparation – giving something back to victimised individuals or communities – provide tangible benefits for both victims and offenders, in a way that incarceration on its own does not. Hence the importance of restorative justice initiatives, both centrally driven, as is the case in juvenile justice, and community-based, as in community restorative justice initiatives.

There are wider questions. We almost all run overcrowded prison systems. In the United Kingdom, the prison population expanded by 27 per cent in the nine years that I was Chief Inspector; thus there were 20,000 more adult men in prison in 2010 than in 2001. That rise has continued and indeed increased in the 18 months since July 2010. Combined with the public spending cuts that are cutting a swathe through all our public services, that makes it impossible for prisons to carry out their basic role and purpose. Hard-won gains are undoubtedly being lost and the human rights both of prisoners and of past and future victims compromised. Immigration detention, too, is increasing: at any one time there are nearly 2700 people in detention, some for lengthy periods, though the detention of children has thankfully diminished considerably.

Yet you cannot spend any time in prisons without realising that they attract those who have already been marginalised in our societies: in effect, they are our 'too difficult' tray. Approximately 90 per cent of children in United Kingdom prisons were excluded from school;⁴⁸ 45 per cent of the girls had been in care.⁴⁹ Half the women in prison had experienced violence in the home, and a third had been sexually abused.⁵⁰ It is estimated that up to 80 per cent of all prisoners had some form of mental disorder when they entered prison, and a majority had issues of drug and alcohol dependence.⁵¹

Those overcrowded systems, and those they hold, raise a final and important human rights point: the proportionality of detention itself. Detention should be the last and not the first resort of criminal and civil justice systems. If prisons – or indeed any kind of custodial environment – are to be used and run effectively, they have to be used sparingly. Decarceration on its own is not, however, enough. It requires reinvestment – in the services and communities that can prevent crime or support those who have offended – not simply disinvestment. Without

48 86 per cent of boys and 82 per cent of girls: see Prison Reform Trust, *Bromley Briefings Prison Factfile*, June 2012, 7 <www.prisonreformtrust.org.uk>.

49 HM Inspectorate of Prisons and Youth Justice Board, *Children and Young People in Custody 2010-11. An Analysis of the Experiences of 15-18-year-olds in Prison* (2011) 17.

50 Prison Reform Trust, above n 48, 8.

51 Nicola Singleton, Michael Farrall and Helle Meltzer, 'Substance Abuse Among Prisoners in England and Wales' (2003) 15(1-2) *International Review of Psychiatry* 150.

that, all our closed systems will continue to struggle to provide humane, safe and purposeful environments that can support the human rights of those living and working within them, and the rights of society as a whole.

Copyright of Law in Context is the property of Federation Press Pty Limited and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.